

STATE OF MICHIGAN  
IN THE SUPREME COURT

FAYTREON ONEE WEST,

Plaintiff-Appellant,

vs.

CITY OF DETROIT, a Municipal  
Corporation,

Defendant-Appellee.

Supreme Court Case No:  
Court of Appeals Case No: 335190  
Lower Court Case No: 15-005357-NO  
Wayne County Circuit Court

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**PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

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**STATEMENT OF JUDGMENT APPEALED FROM**

Plaintiff-Appellant Faytreon Once West seeks leave to appeal the December 12, 2017 opinion of the Court of Appeals affirming the Wayne County Circuit Court's order granting Defendant-Appellee City of Detroit summary disposition. (Exhibit 13).

**STATEMENT OF QUESTIONS PRESENTED**

**I.**

**DID THE TRIAL COURT AND COURT OF APPEALS ERR IN HOLDING THAT PLAINTIFF-APPELLANT IMPROPERLY SERVED HER HIGHWAY DEFECT NOTICE ON DEFENDANT-APPELLEE WHEN IT IS UNDISPUTED THAT DEFENDANT-APPELLEE ACCEPTED SERVICE OF THE NOTICE WITHIN THE STATUTORY PERIOD?**

Plaintiff-Appellant answers:	Yes
The trial court answered:	No
Defendant-Appellee answers:	No
The Court of Appeals answered:	No

**II.**

**DID THE TRIAL COURT AND COURT OF APPEALS ERR IN FAILING TO ESTOP DEFENDANT-APPELLEE FROM ASSERTING LACK OF SERVICE AS A DEFENSE WHEN PLAINTIFF-APPELLANT SERVED HER HIGHWAY DEFECT NOTICE IN THE MANNER INSTRUCTED BY THE CITY?**

Plaintiff-Appellant answers:	Yes
The trial court answered:	No
Defendant-Appellee answers:	No
The Court of Appeals answered:	No

## **INTRODUCTION AND GROUNDS FOR APPLICATION**

For two decades, this Honorable Court has held one maxim over all others: statutes that are clear and unambiguous must be enforced as written. The Governmental Tort Liability Act (GTLA) imposes liability on municipalities for failing to keep sidewalks under their jurisdiction in reasonable repair. It requires an individual who suffers injury to provide notice to the municipality. MCL 691.1404(1) sets forth the required content of such a notice. MCL 691.1404(2) provides for the manner of service of the notice. In discussing service on municipalities, the statute's plain language uses the word "may." In discussing service on the State in the very next sentence, the statute uses the word "shall." Despite the use of the permissive "may" in addressing service on a municipality, in its Opinion, the Court of Appeals improperly created its own judicial construction of the notice statute and interpreted the "may" as a "shall."

This Honorable Court has been crystal clear in its decisions regarding statutory construction. The plain language of the statute provides the best, if not only, guidance as to the Legislature's intent. Only under the most extreme circumstances will this Court sanction a judicial construction that alters a statute's plain language. The Court of Appeals decision fails to provide adequate justification for departing from the plain language of MCL 691.1404(2). Instead, it reaches the unfounded conclusion that interpreting the "may" as written frustrates the purposes of the notice statute. This conclusion is confusing in light of the fact that the notice statute's purpose is to ensure that a governmental entity receive notice, with statutorily mandated information, within 120 days of the injury producing incident. The manner of service is merely ancillary to this purpose.

The circumstances surrounding this case illustrate the fundamental problem with the Court of Appeals decision. It is undisputed that Plaintiff-Appellant served her notice with the required information on Defendant-Appellee City of Detroit within 120 days of her fall. It is undisputed that Defendant-Appellee accepted the notice and sought to investigate the claim within the statutory period. The notice was served on the Detroit City Attorney's office, where the city instructed individuals to file claims. However, because the notice was addressed to the "City of Detroit Law Department" rather than the "Detroit City Attorney," Plaintiff-Appellant cannot maintain her cause of action. Such a result is patently unfair especially in light of the notice statute's plain language.

Plaintiff-Appellant must stress that her proposed statutory construction does not expand a municipality's liability under the GTLA. Claimants will still have to serve a notice on the municipality within 120 days. The notice will still have to contain the statutorily mandated information. Simply put, Plaintiff-Appellant has not asked any court to grant her exception to any of the notice statute's requirements. She merely asks that this Honorable Court interpret the statute as written and hold that the service requirement is met if a municipality chooses to accept service in a manner other than what is suggested in MCL 691.1404(2).

The present application should be granted. The issue involves a legal principle of major significance to the state's jurisprudence. In creating such a low bar to circumvent the plain language of a statute, the Court of Appeals has ignored this Honorable Court's myriad decisions regarding statutory construction. The Court of Appeals interpretation has also ambushed injured parties and their counsel as it has transformed a statutorily permissive action in a mandatory one. Plaintiff-Appellant seeks leave so that this Honorable Court may once again affirm its commitment to interpreting statutes as written, without impermissible judicial construction.

## **STATEMENT OF FACTS**

### **I. Statement of Facts**

Plaintiff Faytreon West suffered injuries in a May 14, 2014 fall while walking along Mansfield Street in the City of Detroit. On that day, at approximately 10:00 p.m., Ms. West, who lived on Mansfield, decided to walk to the store. As she walked south towards West Chicago Road, an obstructed sidewalk forced her to move into the street. The streetlights did not function, making the area dark. As Ms. West walked in the street, her foot caught a pothole and she fell. (Exhibit 1, p. 26-27). Photographs of the pot hole are attached as Exhibit 2. She suffered injuries to her left shoulder, nose, mouth, legs, and back in the fall. (Exhibit 1, p. 28, 32). Although Ms. West did not recall how long the pothole had been there, a individual living in the neighborhood, Betty Jones, indicated that the pothole had been there more than 30 days before the incident. (Exhibit 3).

After the fall, and within 120 days, Plaintiff's counsel sent Defendant's Law Department notice of the incident.<sup>1</sup> It was sent certified mail registered, return receipt requested. It gave the exact location of the fall, provided a map as well as photographs, and disclosed Ms. West's nose, mouth, leg, and left arm injuries. (Exhibit 4). The notice also instructed the city that, "[i]f you believe that this notice does not comply in any way with any applicable notice requirements, immediately contact the undersigned." The "green card" from the mailing indicates that it was received by the City on August 8, 2014. (Exhibit 6). The Detroit city attorney's office is the same address as the law department. (Exhibit 4) (Exhibit 7). The City acknowledged the filing of Ms. West's claim in a letter dated November 30, 2014. (Exhibit 8).

### **II. Procedural History**

Plaintiff-Appellant filed her Complaint in April 2015, alleging that the City failed to keep its highway in reasonable repair. At the close of discovery, Defendant-Appellee filed a motion for summary disposition arguing, among other things, that Plaintiff-Appellant's notice was deficient because it was served on the City's law department and not its attorney. (Exhibit 9). Plaintiff-Appellant, in response, argued that the only alleged deficiency amounted to "City of Detroit Law

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<sup>1</sup>At the time, the City, through both its website and claim forms, instructed citizens to file sidewalk injury claims with the Law Department. (Exhibit 5).

Department” being on the notice’s envelope instead of “Detroit City Attorney.” Since the notice was sent to the proper office and the City acknowledged its receipt, dismissal of the claim on this ground would be unduly harsh. (Exhibit 10). At oral argument, the trial court agreed with Defendant-Appellee, found this issue to be dispositive, and dismissed the case. (Exhibit 11). Plaintiff-Appellant filed a motion for reconsideration, pointing out that the City instructed claimants to file notices with the law department, and not the city attorney. (Exhibit 12). The trial court denied the motion. Plaintiff appealed the trial court’s decision. In a December 12, 2017 opinion, the Court of Appeals affirmed.

### STANDARD OF REVIEW

This Court applies *de novo* review to a trial court's decision to either grant or deny summary disposition pursuant to MCR 2.116(C)(7). *Rowland v. Washtenaw Co. Rd. Comm'n*, 477 Mich 197, 202; 731 NW2d 41 (2007). In deciding the issue of governmental immunity, all evidence must be viewed in a light most favorable to Plaintiff-Appellee as the nonmoving party. *Herman v. Detroit*, 261 Mich App 141, 143-144; 680 NW2d 71 (2004). All reasonable inferences must also be drawn in favor of the nonmovant Plaintiff-Appellee. *Scalise v. Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). Summary disposition is proper only if the proffered evidence fails to establish a genuine issue regarding any material fact. *Maiden v. Rozwood*, 461 Mich 119, 121; 591 NW2d 817 (1999).

## LAW AND ARGUMENT

### I.

#### **THE TRIAL COURT AND COURT OF APPEALS ERRED IN HOLDING THAT PLAINTIFF-APPELLANT IMPROPERLY SERVED HER HIGHWAY DEFECT NOTICE ON DEFENDANT-APPELLEE WHEN IT IS UNDISPUTED THAT DEFENDANT-APPELLEE ACCEPTED SERVICE OF THE NOTICE WITHIN THE STATUTORY PERIOD.**

Michigan law requires individuals harmed by a highway defect to provide notice to the responsible municipality within 120 days of the injury. MCL 691.1404(1). In *Plunkett v. Dep't of Transportation*, 286 Mich App 168, 176; 779 NW2d 263 (2009), the Michigan Court of Appeals addressed the purpose of the notice statute and held:

[W]hen notice is required of an average citizen for the benefit of a governmental entity, it need only be understandable and sufficient to bring the important facts to the governmental entity's attention. This, **a liberal construction of the notice requirement is favored** to avoid penalizing an inexperienced layman for some technical defect. The principle purposes to be served by requiring notice are simply (1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured.

*Id.* at 176-177 (emphasis added). The court, quoting other Michigan precedent, went on to state, “[t]he requirement should not receive so strict a construction as to make it difficult for the average citizen to draw a good notice....”, and “[A] notice should not be held ineffective when in ‘substantial compliance with the law....’” Finally, it held that “[s]ome degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects.” *Id.* at 177 (citations omitted, emphasis in original).

MCL 691.1404(2) sets forth how an injured party may effectuate service of such a notice. The statute reads, in relevant part:

The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, **who may lawfully be served** with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. In case of the state, such notice shall be filed in triplicate with the clerk of the court of claims. [emphasis added].

Importantly, the statute's language utilizes both the words “may” and “shall” when discussing service of a highway defect notice. With respect to the state, claimants “shall” file the notice in a particular manner set forth. However, with respect to municipalities, notice “may” be filed in the

prescribed manner. Generally, when used in statutes, the use of the word “shall” creates mandatory action, while the use of the word “may” signals permissive action. *Murphy v. Sears, Roebuck & Co.*, 190 Mich App 384, 386-387; 476 NW2d 639 (1991).

The use of the word “may” in discussing service on municipalities eliminates any legislative intent to mandate an exact manner of service. Instead, it merely indicates an intent to expand the instances where service will be deemed prima facie proper. In cases where the method is followed, a municipality cannot argue lack of service, regardless of any surrounding circumstances. In cases where it is not followed, the municipality can contest service. The claimant would then be left with the burden of showing that the municipality otherwise received notice within the statutory period. Because the statute uses the word “may,” serving notice in another manner would not be fatal to an eventual claim so long as the claimant can establish municipality actually received the required notice within 120 days.

Such an interpretation is in harmony with general rules governing service of process. These rules ensure that individuals receive proper notice regarding actions taken in court against them. They do not create an exhaustive list of how one must effectuate service. They merely create minimum standards that, if followed, deem an individual served, regardless of any other considerations. A litigant, properly served via a method enumerated the court rules, cannot later contest service even if he or she did not gain actual notice of the action (e.g., failed to read the papers once served, immediately threw out an envelope that had been signed for, etc.). However, service is not fatal if effectuated in a manner not set forth in the court rules so long as the served party received actual notice within the allowed time. MCR 2.105(J)(3). In these instances, the serving party cannot rely on the court rules to create prima facie service and bears the burden of establishing the served party’s actual notice. *See, e.g., Holliday v. Townley*, 189 Mich App 424; 473 NW2d 733 (1991).

At the very least, the use of the word “may” indicates a legislative intent to allow municipalities to accept alternate means of service. This follows from the language regarding service on a municipality versus service on the State. In establishing the rules of service on the State, the Legislature used the word “shall” and therefore created a mandatory obligation. However, a mere

sentence earlier, it used the word “may” in addressing service on municipalities. Clearly, through its use of the word “shall” regarding service on the State, the Legislature knew it could likewise impose a mandatory method of service on municipalities. It did not and instead only used permissive language. The only explanation for the difference is that the Legislature intended to allow municipalities to accept less restrictive means of service if they so choose.<sup>2</sup>

Interpreting the statute in this manner does not frustrate the legislative intent of the statute. When reading the it as a whole, its intent is clear: “The principle purposes to be served by requiring notice are simply (1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured.” *Plunkett, supra*. In furtherance of this overall purpose, the claimant must give notice containing a required amount of information within 120 days of the incident. MCL 691.1404(1). Allowing other manners of service on municipalities, especially in light of the permissive “shall,” does not frustrate this intent so long as the notice contains the required information and is given within the statutory period. Had the Legislature wanted otherwise, it would have mandated the manner of service on municipalities much like it did on the State.

Likewise, such an interpretation does not render any of the statutory language nugatory. The statute creates a manner of service that, if followed, creates prima facie notice. **If a claimant fails to utilize this method, he or she does so at his or her own peril.** A municipality is not required to accept or acknowledge service if done so in another manner. Therefore, if a claimant fails to follow the method prescribed in the statute and later files suit, the municipality is free to contest the receipt of notice. The burden would then fall to the claimant to establish that the municipality accepted notice of claim within 120 days. If the claimant could not meet that burden, dismissal would be the proper remedy. Interpreting the statute in this manner does not grant a claimant free reign to file a notice in any manner he or she chooses. It simply means that a claimant’s failure to file the notice in the rote manner set forth in MCL 691.1404(2) is not fatal in instances where a

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<sup>2</sup>The statutory language “anything to the contrary in the charter of any municipal corporation notwithstanding” does not alter this analysis. In the context of the statute and the use of the word “may” this clause means that municipal charters cannot create service requirements more restrictive than those created by the statute. It would not eliminate a municipality’s right to accept less restrictive means of service.

municipality otherwise accepted service of a statutorily sufficient notice within the 120 day period.

Interpreting MCL 691.1404(2) in this manner also follows the general principle that statutes must “be construed to prevent absurd results....” *Rafferty v. Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999). In the case at bar, it is undisputed that Defendant-Appellee received Plaintiff-Appellant’s highway defect notice within the statutory period. The notice was served on the city attorney’s address in a manner dictated by Defendant-Appellee. The only technical error Defendant-Appellee relies on is that the envelope stated “City of Detroit Law Department” rather than “Detroit City Attorney.” It argues that, even though it received notice within the statutory period in a manner it dictated to claimants, this minor technical error is fatal to Plaintiff-Appellant’s claim. Interpreting the statute to allow the City to escape liability under these circumstances creates an absurd result.

In the case at bar, the trial court and Court of Appeals erred in holding that Plaintiff-Appellant’s failure to address her notice to the Detroit city attorney is fatal to her lawsuit. The evidence establishes that Defendant-Appellee accepted service of notice within the 120 day period. (Exhibit 6) (Exhibit 7). It also establishes that the City itself instructed its citizens to file notices through the law department rather than the city attorney. (Exhibit 5). The plain language of MCL 691.1404(2) does not make the method of service it outlines mandatory. Since the City generally accepted notice in a manner not set forth in the statute, Plaintiff-Appellant filed her notice in this matter, and there is no evidence that Defendant-Appellee failed to receive notice within the 120 day period, he lawsuit should not have been dismissed on the grounds that she failed to properly serve her notice on the City.<sup>3</sup>

## II.

### **THE TRIAL COURT AND COURT OF APPEALS ERRED IN FAILING TO ESTOP DEFENDANT-APPELLEE FROM ASSERTING LACK OF SERVICE AS A DEFENSE WHEN PLAINTIFF-APPELLANT SERVED HER HIGHWAY DEFECT NOTICE IN THE MANNER INSTRUCTED BY THE CITY.**

The facts of the case at bar also support a holding that Defendant-Appellee should be

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<sup>3</sup> At the very least, service via certified mail on the same address as the city attorney constitutes “substantial compliance” with the notice requirement, especially since the Defendant-Appellee acknowledge receipt and accepted service.

estopped from asserting that it was not properly served the highway defect notice. On its website, the City of Detroit has instructions of filing a “law claim” against it. City of Detroit, *Law Claims FAQs* <<http://www.detroitmi.gov/How-Do-I/File/Law-Claims-FAQs>> (accessed September 6, 2016). (Exhibit 5). The website instructs claimants to fill out a form and mail or fax it to the City of Detroit Law Department. (Exhibit 5, p. 2). The form linked to and provided by the City also instructs claimants to file it with the law department; not the city attorney or any other individual. (Exhibit 5, p. 3). The form clearly contemplates highway defect claims as question no. 3 asks about accidents caused by a street or sidewalk. (Exhibit 5, p. 4).

The facts provide an almost textbook example compelling the use of equitable estoppel to preclude Defendant-Appellee from asserting improper service of the highway defect notice. Under Michigan law,

Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts.

*AFSCME Int'l Union v. Bank One*, 267 Mich.App 281, 293; 705 NW2d 355 (2005). In the case at bar, Defendant-Appellee’s actions, through its website and claim forms, induced its citizens to believe that highway defect notices could be served on its law department rather than any individual. Plaintiff-Appellant relied on that belief as she sent her notice to the law department as instructed. This reliance was justified as the City later sent acknowledgment of the claim. If the City is allowed to successfully contest service made in accordance with its own instructions, Plaintiff-Appellant would suffer the most severe prejudice as simply following them is now fatal to her claim.

**CONCLUSION AND RELIEF REQUESTED**

Plaintiff-Appellant served a highway defect notice on the City of Detroit. The notice was served in a manner consistent with the City's instructions. The City accepted and acknowledged service of the notice. It now argues that Plaintiff-Appellant's suit must be dismissed because of what it alleges to be a minor technical defect in the service it encouraged and accepted. The plain language of MCL 691.1404(2) and the equities of the circumstances compel a different outcome and the trial court erred in granting Defendant-Appellee summary disposition. The Court of Appeals erred in affirming the trial court's decision

WHEREFORE, Plaintiff-Appellant respectfully requests that this Honorable Court preemptorily reverse the Court of Appeals, overturn the Court Wayne Circuit Court's Order granting Defendant-Appellee summary disposition, and remand the case to the trial court for further proceedings. In the alternative, Plaintiff-Appellant respectfully requests that this Honorable Court grant her Application for Leave to Appeal and allow the parties to fully brief and argue the issue.

Respectfully Submitted,

**RAVID & ASSOCIATES, P.C.**

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DATED: January 23, 2018

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**PROOF OF SERVICE**

The undersigned, certifies that a copy of Plaintiff-Appellant's:

1. Application for Leave to Appeal
2. Plaintiff-Appellant's Notice of Filing of Application for Leave to Appeal

were served upon the appellate attorney of record of all parties to the above cause by delivering the same to them at their respective business addresses as disclosed by the pleadings of record herein via electronic mail on January 23, 2018. Notice was served on the Court of Appeals and Wayne County Circuit Court via those court's electronic filing systems on January 23, 2018.

\_\_\_\_\_  
/s/Keith M. Banka  
Keith M. Banka

DATED: January 23, 2018.